MOTION FILED

JUN 22 1982

No. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the United States Conference of Mayors hereby moves for leave to file a brief Amicus Curiae in the above-captioned proceedings, and in support thereof states:

1. The decision of the United States Court of Appeals for the Fourth Circuit, in providing relief to the Respondent, appears deficient in its analysis of the relationship of the commo

law to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq., in that it misread both the language of the Act and the intent of Congress as they relate to matters in derogation of the common law.

2. The decision below will have far reaching consequences for the cities of America, virtually all of which have undertaken significant economic and community development rehabilitation projects which included the use of federal funds to effect their result. If allowed to stand, the decision below may well result in vast, new and unanticipated liabilities which will fall on cities.

3. The Fourth Circuit decision also reflects a substantial change in the direction of the construction of the Act and Amicus intends to demonstrate in its brief that the decision is an unreasonable interpretation of the law which will have incongruous and undesirable results.

4. This case presents important issues

of law of direct and immediate concern to the members of the Amicus Curiae, the nation's cities.

5. Accordingly, the Amicus Curiaę seeks this opportunity to make known its views to the Court and to attempt to assist the Court in its decision on the need to review this case.

6. Counsel for Amicus Curiae has sought, but was unable to secure from Respondent, consent to file this brief Amicus Curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE

OF

THE UNITED STATES CONFERENCE OF MAYORS

THE INTEREST OF THE AMICUS CURIAE

The UNITED STATES CONFERENCE OF MAYORS is an organization of city governments represented through their chief elected officials, Mayors. The Conference was organized in 1932 to promote the causes of the city and to foster responsible and effective relationships between city halls and the federal government. The Conference of Mayors is the national forum through which the elected officials of the nation's larger cities express their concerns and work to meet the needs of urban America. By limiting its membership to cities of over 30,000 in population, the Conference of Mayors represents the needs of larger cities. Of the 800 cities eligible for membership in the Conference, over 480 are full members, including virtually all cities of over 100,000 in population.

The United States Conference of Mayors is a not-for-profit membership corporation organized under the laws of the State of

Illinois. It is domiciled in the District of Columbia.

Petitioner, NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, works closely with the city and Mayor of Norfolk, Virginia. (See the description of the relationship at pp. 3 - 5 of the Petition for Certiorari.) The City of Norfolk, Virginia is a full and active member of the Conference of Mayors, and the Mayor of Norfolk, Vincent J. Thomas, serves as chairman of the Conference's Sub-committee on Community Development of the standing Committee on Community Development, Housing and Economic Development.

In addition to the substantial effect the decision below will have on the City of Norfolk, the Conference of Mayors is concerned that cities throughout the United States will be facing claims, both retro-active and current, for relocation assist-ance for public utilities. This development, resulting solely from the interpretation of the Uniform Act by the Fourth Circuit, would

be at variance with long lines of cases under the common law and could effectively obviate long-settled patterns and practices whereby the state legislatures provided for the allocation of costs for relocation of facilities by public utilities between taxpayers and rate payers by use of their oversight authority over municipalities and public utility rate setting commissions.

The fundamental change in the determination of these issues between federal and state law which would result from the decision below is simply unacceptable in the federal system without some clearer statement of congressional intent that this result should ensue.

This change, and the costs associated with it, both in terms of dollars and the loss of local and state control over some aspects of public utility franchising, will adversely affect the nation's cities. Accordingly, the Conference of Mayors urges that the Court grant the Petition for Certiorari in this cause.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fourth Circuit should be reviewed by this Court as it misreads the Uniform Relocation Act and such misreading has far reaching economic consequences.

1. The well-settled rule of common law is that utilities bear their cost of relocation when displaced from public rights of way. The court below violated the standard rules of statutory construction when it ruled that the Uniform Act provided reimbursement of such costs in the absence of a clear indication of congressional intent to do so.

2. The inclusion of utilities in the definition of "displaced person" under the Uniform Act will lead to unreasonable, undesirable, and even absurd results, Congress certainly did not intend. Utilities invariably recover their relocation costs from their consumers through additions to their rate base, and reimbursement under the Uniform Act will constitute an undesirable and unin-

tended windfall. Further, under the decision below, although some utilities will recover their relocation costs, many, if not most, others will not under identical factual circumstances of displacement.

The only reasonable - and the correct - construction of the Uniform Act is that Congress intended to leave undisturbed the existing and settled common law that excluded utilities from being reimbursed for relocation of their equipment upon displacement.

ARGUMENT

I.

THE UNIFORM RELOCATION ACT SHOULD NOT BE CONSTRUED TO COVER UTILITIES AS "DISPLACED PERSONS" ABSENT CLEAR CONGRESSIONAL STATEMENT

The U.R.A. and its legislative history demonstrate Congress did not intend to extend relocation assistance to all persons displaced by governmental actions. Alexander v. HUD, 441 U.S. 39 (1979).

At common law, utilities have to relocate their facilities at their own expense when displaced from public streets. Mountain States Telephone & Telegraph Co., et al. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P2d 1084 (1980).

By their nature, utilities provide a governmental or other public service to the population. Uniquely, utilities are the only nontransportation operations allowed to install, maintain and operate their facilities in public rights of way. In doing so they obtain franchises which in some instances are

regarded as property rights. See e.g. Owensboro v. Cumberland Telephone & Telegraph Co., 230 U.S. 58, 65 (1913).

However the easements or rights granted utilities are in trust for the public and not a grant of right to private individuals. New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 197 U.S. 453 (1905). Moreover, by such grant the utility does not thereby acquire a right to install its equipment in any specific location. id. at 197 U.S. 461.

When utilities are forced to relocate within or from specific public right of way, it is not because the public has terminated or acquired the utilities' right to provide services; the government merely requires a utility to relocate elsewhere for a public project involving that right of way. Courts have recognized this distinction, and have treated utility relocation as a cost of doing business (non-compensable) rather than an acquisition of a property right (compensable) under common law. See e.g. Detroit Board of

Education v. Michigan Bell Telephone Co., 51 Mich App. 488, 502, 215 NW 2d 704, 711 (1974), affd. 395 Mich 1, 232 NW 2d 633 (1975).

Because utilities provide essential public services, when required to relocate their equipment from a specific right of way, they invariably are provided an alternative location by the government so that the essential services are not terminated or interrupted.

As our cities and local communities have developed, there have been countless instances in which such utility relocations have occurred. The governments and utilities have resolved the allocation of those costs through the mechanism of rate adjustments by public bodies regulating these utilities. The method of apportioning such costs is often a complex matter requiring an enormous amount of technical testimony appropriate for resolution by a public regulatory agency and not the courts. See, e.g. Consumer Power Co. v.

Costle, 615 F2d 1147 (CA 6, 1980). The settled practice has been to apportion such relocation costs in state and local rate-making proceedings, as was done with respect to C & P Telephone in the instant case.

In light of this well known body of state law and practice, and the universal nature of the problem, Congress would be expected to have deliberated expressly about including utilities as displaced persons under the Uniform Act before changing a long-standing system of treatment of utility relocation expenses.

Moreover, in enacting the Uniform Act, Congress repealed eleven federal statutes or portions thereof, including Sections 32 and 33 of the Federal Highway Act of 1968 (Public Law 90-495). However Congress did not repeal Section 123 of the Federal Aid Highway Act of 1958 (23 U.S.C. Sec. 123) which authorizes federal reimbursement of utility relocation expenses only when permitted by state law or when required by contract between the state and the utility. Consequently, the Uniform

Act does not apply to utilities relocated under this federal aid highway program, and those utilities continue to bear their own relocation costs in the great majority of states.

The Uniform Act and 23 U.S.C. Sec. 123 must be construed harmoniously wherever possible. Morton v. Mancari, 417 U.S. 535, 551 (1974). However, to give effect to Sec. 123, the Uniform Act cannot apply to utility relocation under the Federal Aid Highway Act of 1958. Logically, it can either apply (a) only to other utility relocations under federal programs or (b) not at all to utility relocation. In view of its primary purpose of uniformity in treatment, the Uniform Act must be construed not to cover any utility relocations.

The Uniform Act, which is in derogation of the common law, is to be read favoring the retention of long established and familiar common law principles except where a statutory purpose to the contrary is evident. Isbrandtsen

v. Johnson, 343 U.S. 779, 783 (1932). Absent the clearest statement of Congressional policy, the court should not impute to Congress an interest to authorize action in contravention of settled common law principles. Tarlton v. Saxbe, 165 U.S. App. D.C. 293, 507 F2d 1116 (D.C. Cir. 1974).

Thus the terms "displaced person", "person" and "business" under the Uniform Act should not be extended to utilities inasmuch as Congress did not express its intent so to change the settled body of common law, or prior federal law relating to such utility matters. These are matters that should be resolved by the Congress rather than the Courts. See Consumer Power Co. v. Costle, supra at p. 1150.

II.

CONSTRUING THE UNIFORM ACT TO INCLUDE UTILITIES AS "DISPLACED PERSONS" WILL YIELD INCONGRUOUS AND UNDESIRED RESULTS

Far from promoting uniformity of treatment of displacees, Alexander v. HUD, supra, the Uniform Act as construed by the Fourth Circuit below will reimburse the relocation expenses,

but exclude others under similar factual circumstances. The decision will lead to incongruous, undesirable and even absurd results.

Under the Uniform Act, displaced persons are paid only for the relocation or loss of their personal property. 42 U.S.C. Sec. 4622. However, in many, if not most states, utility equipment installed in public rights of way is treated as real property. See e.g. Fischbach & Moore, Inc. v. State Board of Equalization, 117 CA 3d 627 (1981) (California); Kalamazoo Municipal Utilities Association v. City of Kalamazoo, 345 Mich 318 (1956) (Michigan); In the Matter of Manhattan Cable TV Services v. Tax Commission of City of New York, 49 N.Y. 2d 868 (1980); (New York).

Thus, in numerous instances utilities will not be eligible for relocation assistance under the Uniform Act even if the other criteria of the law are met.

From the viewpoint of the utilities, distinction between real and personal property is meaningless in the context of the Uniform Act.

Utility equipment when placed in a public right of way is assumed to be placed there permanently. When a utility is displaced from a right of way, it invariably installs new equipment in the substitute location; it abandons the old equipment save that which has sufficient salvage value. Thus utilities alone, unlike other businesses, never intend to relocate their equipment when displaced. However utilities, unlike other businesses, anticipate frequent displacement, given their location in public rights of way. Further, all utilities typically depreciate their equipment over an assumed period of useful life, and this cost accounting is reflected in the utilities' rate bases. As a result, when any utility is reimbursed under the Uniform Act, it effectively represents a windfall payment for costs it has already recovered or will recover from its consumers.

A further incongruity results from the fact that utilities alone locate equipment in public rights of way, and often those rights of way, being in public ownership, are not acquired

for a federal project or one undertaken with federal financial assistance. Thus, displacement because of adjustments in the particular right of way in connection with such a project ordinarily does not involve acquisition of such property. Even if the public right of way were changed to some other use, there would be no acquisition so long as title to that property was not transferred. In either event, the utility has been displaced. But, if the city which owned the right of way transferred title to the right of way to another, then under the Fourth Circuit decision, the utility displacement cost would be reimbursable under the Uniform Act.

These distinctions point up the incongruous and irrational results different utilities will encounter under essentially similar situations arising under projects covered by the Uniform Act.

The term "displaced person" under the Uniform Act can be construed to exclude as well as include utilities. Since to include

utilities would yield unreasonable results, the golden rule of statutory construction requires that the only reasonable construction - the exclusion of utilities from the definition - be selected. 2A Sands, Sutherland Statutory Construction § 45.12 at 37 (4th Ed 1973). See also Commissioner of Internal Revenue v. Brown, 380 U.S. 563 (1965).

These incongruous aspects of the Fourth Circuit's decision leading to unreasonable results indicate it does not represent Congressional intent and should not be sustained. When the plain meaning of a statute produces an unreasonable, even if not absurd, result plainly at variance with the policy of the legislation, the courts will follow the purpose of the statute rather than the literal words. United States v. American Trucking Association, 310 U.S. 534, 543 (1940). See also, Helvering v. Hammel, 311 U.S. 504, 510, 511 (1941).

CONCLUSION

For all the foregoing reasons, the Court

of Appeals decision in this case should be reviewed by this Court.

Dated: July 21, 1982

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 1982, three copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae were mailed, postage prepaid to each of the following:

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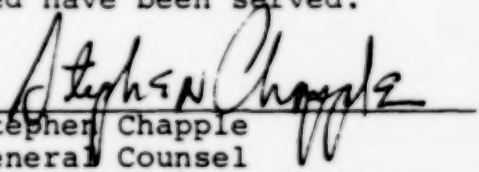

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